Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

2 September 2021 *

(Failure of a Member State to fulfil obligations – Directive 91/271/EEC – Articles 4, 5, 10 and 15 – Urban waste water treatment – Secondary or equivalent treatment of urban waste water from agglomerations of certain dimensions – More stringent treatment of discharges into sensitive areas – Article 4(3) TEU – Verification of data provided by the Member States – Obligation of sincere cooperation)

In Case C-22/20,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 17 January 2020,

European Commission, represented by E. Manhaeve, C. Hermes and K. Simonsson and by E. Ljung Rasmussen, acting as Agents,

applicant,

v

Kingdom of Sweden, represented by O. Simonsson and by R. Shahsavan Eriksson, C. Meyer-Seitz, M. Salborn Hodgson, H. Shev and H. Eklinder, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 25 March 2021,

gives the following

* Language of the case: Swedish.

Judgment

1 By its action, the European Commission requests that the Court declare that:

– the Kingdom of Sweden has failed to fulfil its obligations under Article 4(3) TEU by not providing the Commission with the information necessary for it to assess the accuracy of the claims that the urban waste water discharged from the treatment plants for the agglomerations Habo and Töreboda satisfy the requirements of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p. 40), as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 (OJ 2008 L 311, p. 1) ('Directive 91/271');

– the Kingdom of Sweden has failed to fulfil its obligations under Article 4 in conjunction with Articles 10 and 15 of Directive 91/271 by not ensuring that, before it is discharged, urban waste water from the agglomerations Lycksele, Malå, Mockfjärd, Pajala, Robertsfors and Tänndalen is subject to secondary treatment or an equivalent treatment in accordance with the requirements of the directive, and

– the Kingdom of Sweden has failed to fulfil its obligations under Article 5 in conjunction with Articles 10 and 15 of Directive 91/271 by not ensuring that, before it is discharged, urban waste water from the agglomerations Borås, Skoghall, Habo and Töreboda is subject to more stringent treatment than that described in Article 4 of that directive in accordance with the requirements of the same directive.

Legal context

2 Article 1 of Directive 91/271 states:

'This Directive concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors.

The objective of the Directive is to protect the environment from the adverse effects of the abovementioned waste water discharges.'

3 Article 4 of that directive reads as follows:

'1. Member States shall ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment as follows:

– at the latest by 31 December 2000 for all discharges from agglomerations of more than 15 000 p.e. [(population equivalent)],

– at the latest by 31 December 2005 for all discharges from agglomerations of between 10 000 and 15 000 p.e.,

– at the latest by 31 December 2005 for discharges to fresh water and estuaries from agglomerations of between 2 000 and 10 000 p.e.

…

2. Urban waste water discharges to waters situated in high mountain regions (over 1 500 m above sea level) where it is difficult to apply an effective biological treatment due to low temperatures may be subjected to treatment less stringent than that prescribed in paragraph 1, provided that detailed studies indicate that such discharges do not adversely affect the environment.

3. Discharges from urban waste water treatment plants described in paragraphs 1 and 2 shall satisfy the relevant requirements of section B of Annex I. The Commission may amend those requirements. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

4. The load expressed in p.e. shall be calculated on the basis of the maximum average weekly load entering the treatment plant during the year, excluding unusual situations such as those due to heavy rain.'

4 Article 5 of that directive provides:

'1. For the purposes of paragraph 2, Member States shall by 31 December 1993 identify sensitive areas according to the criteria laid down in Annex II.

2. Member States shall ensure that urban waste water entering collecting systems shall before discharge into sensitive areas be subject to more stringent treatment than that described in Article 4, by 31 December 1998 at the latest for all discharges from agglomerations of more than 10 000 p.e..

3. Discharges from urban waste water treatment plants described in paragraph 2 shall satisfy the relevant requirements of section B of Annex I. The Commission may amend those requirements. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

4. Alternatively, requirements for individual plants set out in paragraphs 2 and 3 above need not apply in sensitive areas where it can be shown that the minimum percentage of reduction of the overall load entering all urban waste water treatment plants in that area is at least 75% for total phosphorus and at least 75% for total nitrogen.

5. Discharges from urban waste water treatment plants which are situated in the relevant catchment areas of sensitive areas and which contribute to the pollution of these areas shall be subjected to paragraphs 2, 3 and 4.

In cases where the above catchment areas are situated wholly or partly in another Member State Article 9 shall apply.

6. Member States shall ensure that the identification of sensitive areas is reviewed at intervals of no more than four years.

7. Member States shall ensure that areas identified as sensitive following review under paragraph 6 shall within seven years meet the above requirements.

8. A Member State does not have to identify sensitive areas for the purpose of this Directive if it implements the treatment established under paragraphs 2, 3 and 4 over all its territory.'

5 In accordance with Article 10 of that directive:

'Member States shall ensure that the urban waste water treatment plants built to comply with the requirements of Articles 4, 5, 6 and 7 are designed, constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions. When designing the plants, seasonal variations of the load shall be taken into account.'

6 Article 15 of Directive 91/271 provides:

'1. Competent authorities or appropriate bodies shall monitor:

– discharges from urban waste water treatment plants to verify compliance with the requirements of Annex I.B in accordance with the control procedures laid down in Annex I.D,

– amounts and composition of sludges disposed of to surface waters.

2. Competent authorities or appropriate bodies shall monitor waters subject to discharges from urban waste water treatment plants and direct discharges as described in Article 13 in cases where it can be expected that the receiving environment will be significantly affected.

3. In the case of a discharge subject to the provisions of Article 6 and in the case of disposal of sludge to surface waters, Member States shall monitor and carry out any other relevant studies to verify that the discharge or disposal does not adversely affect the environment.

4. Information collected by competent authorities or appropriate bodies in complying with paragraphs 1, 2 and 3 shall be retained in the Member State and made available to the Commission within six months of receipt of a request.

5. The Commission may formulate guidelines on the monitoring referred to in paragraphs 1, 2 and 3 in accordance with the regulatory procedure referred to in Article 18(2).'

7 Annex I.B to that directive is worded as follows:

'Discharge from urban waste water treatment plants to receiving waters …

1. Waste water treatment plants shall be designed or modified so that representative samples of the incoming waste water and of treated effluent can be obtained before discharge to receiving waters.

2. Discharges from urban waste water treatment plants subject to treatment in accordance with Articles 4 and 5 shall meet the requirements shown in Table 1.

3. Discharges from urban waste water treatment plants to those sensitive areas which are subject to eutrophication as identified in Annex II.A(a) shall in addition meet the requirements shown in Table 2 of this Annex.

4. More stringent requirements than those shown in Table 1 and/or Table 2 shall be applied where required to ensure that the receiving waters satisfy any other relevant Directives.

5. The points of discharge of urban waste water shall be chosen, as far as possible, so as to minimise the effects on receiving waters.'

8 Annex I.D to that directive provides:

'Reference methods for monitoring and evaluation of results

1. Member States shall ensure that a monitoring method is applied which corresponds at least with the level of requirements described below.

   Alternative methods to those mentioned in paragraphs 2, 3 and 4 may be used provided that it can be demonstrated that equivalent results are obtained.

   Member States shall provide the Commission with all relevant information concerning the applied method. If the Commission considers that the conditions set out in paragraphs 2, 3 and 4 are not met, it will submit an appropriate proposal to the Council.

2. Flow-proportional or time-based 24-hour samples shall be collected at the same well-defined point in the outlet and if necessary in the inlet of the treatment plant in order to monitor compliance with the requirements for discharged waste water laid down in this Directive.

   Good international laboratory practices aiming at minimising the degradation of samples between collection and analysis shall be applied.

3. The minimum annual number of samples shall be determined according to the size of the treatment plant and be collected at regular intervals during the year:

– 2 000 to 9 999 p.e.:	12 samples during the first year. four samples in subsequent years, if it can be shown that the water during the first year complies with the provisions of the Directive; if one sample of the four fails, 12 samples must be taken in the year that follows.
– 10 000 to 49 999 p.e.:	12 samples.
– 50 000 p.e. or over:	24 samples.

4. The treated waste water shall be assumed to conform to the relevant parameters if, for each relevant parameter considered individually, samples of the water show that it complies with the relevant parametric value in the following way:

   (a) for the parameters specified in Table 1 and Article 2(7), a maximum number of samples which are allowed to fail the requirements, expressed in concentrations and/or percentage reductions in Table 1 and Article 2(7), is specified in Table 3;

   (b) for the parameters of Table 1 expressed in concentrations, the failing samples taken under normal operating conditions must not deviate from the parametric values by more than 100%. For the parametric values in concentration relating to total suspended solids deviations of up to 150% may be accepted;

   (c) for those parameters specified in Table 2 the annual mean of the samples for each parameter shall conform to the relevant parametric values.

5. Extreme values for the water quality in question shall not be taken into consideration when they are the result of unusual situations such as those due to heavy rain.'

9 Tables 1 to 3 of Annex I to that directive read as follows:

'Table 1: Requirements for discharges from urban waste water treatment plants subject to Articles 4 and 5 of the Directive. The values for concentration or for the percentage of reduction shall apply.

Parameters	Concentration	Minimum percentage of reduction (1)	Reference method of measurement
Biochemical oxygen demand (BOD5 at 20 °C) without nitrification (2)	25 mg/l O_2	70-90 40 under Article 4(2)	Homogenized, unfiltered, undecanted sample. Determination of dissolved oxygen before and after five-day incubation at 20 °C ± 1 °C, in complete darkness. Addition of a nitrification inhibitor
Chemical oxygen demand (COD)	125 mg/l O_2	75	Homogenized, unfiltered, undecanted sample. Potassium dichromate
Total suspended solids	35 mg/l (3) 35 under Article 4(2) (more than 10 000 p.e.) 60 under Article 4(2) (2 000-10 000 p.e.)	90 (3) 90 under Article 4(2) (more than 10 000 p.e.) 70 under Article 4(2) (2 000-10 000 p.e.)	— Filtering of a representative sample through a 0,45 µm filter membrane. Drying at 105 °C and weighing — Centrifuging of a representative sample (for at least five mins with mean acceleration of 2 800 to 3 200 g), drying at 105 °C and weighing

(1) Reduction in relation to the load of the influent.
(2) The parameter can be replaced by another parameter: total organic carbon (TOC) or total oxygen demand (TOD) if a relationship can be established between BOD5 and the substitute parameter.
(3) This requirement is optional.

Analyses concerning discharges from lagooning shall be carried out on filtered samples; however, the concentration of total suspended solids in unfiltered water samples shall not exceed 150 mg/l.

Table 2: Requirements for discharges from urban waste water treatment plants to sensitive areas which are subject to eutrophication as identified in Annex II.A(a). One or both parameters may be applied depending on the local situation. The values for concentration or for the percentage of reduction shall apply.

Parameters	Concentration	Minimum percentage of reduction (1)	Reference method of measurement
Total phosphorus	2 mg/l (10 000-100 000 p.e.)	80	Molecular absorption spectrophotometry
	1 mg/l (more than 100 000 p.e.)		
Total nitrogen (2)	15 mg/l (10 000-100 000 p.e.)	70-80	Molecular absorption spectrophotometry
	10 mg/l (more than 100 000 p.e.) (3)		

(1) Reduction in relation to the load of the influent.
(2) Total nitrogen means the sum of total Kjeldahl nitrogen (organic and ammoniacal nitrogen) nitrate-nitrogen and nitrite-nitrogen.
(3) These values for concentration are annual means as referred to in Annex I, paragraph D.4(c). However, the requirements for nitrogen may be checked using daily averages when it is proved, in accordance with Annex I, paragraph D.1, that the same level of protection is obtained. In this case, the daily average must not exceed 20 mg/l of total nitrogen for all the samples when the temperature from the effluent in the biological reactor is superior or equal to 12 °C. The conditions concerning temperature could be replaced by a limitation on the time of operation to take account of regional climatic conditions.

Table 3

Series of samples taken in any year	Maximum permitted number of samples which fail to conform
4-7	1
8-16	2
17-28	3
29-40	4
41-53	5
54-67	6
68-81	7
82-95	8
96-110	9
111-125	10
126-140	11
141-155	12
156-171	13
172-187	14
188-203	15
204-219	16
220-235	17

236-251	18
252-268	19
269-284	20
285-300	21
301-317	22
318-334	23
335-350	24
351-365	25’

Pre-litigation procedure

10 On 29 January 2010, the Commission sent the Kingdom of Sweden a letter of formal notice in which questioned that Member State in respect of whether its system for treating urban waste water complies with Directive 91/271.

11 In particular, the Commission considered, first, that that Member State had failed to ensure that the waste water from 13 agglomerations is subject to secondary treatment or an equivalent treatment in accordance with the requirements of Article 4(1) and (3) of Directive 91/271. Secondly, that institution took the view that that Member State had failed to ensure that the waste water from three agglomerations is subject to more stringent treatment than that described in Article 4 of the directive, in accordance with the requirements of Article 5(2) and (3) thereof.

12 The Kingdom of Sweden replied to that letter of formal notice by letters dated 1 April and 4 November 2010.

13 As it was not satisfied with the explanations provided by that Member State, the Commission decided to send it, on 25 September 2015, a supplementary letter of formal notice in which it identified 11 additional agglomerations which did not have a secondary treatment system or a system for an equivalent treatment and 26 additional agglomerations in respect of which that Member State had not ensured more stringent treatment within the meaning of Article 5(2) and (3) of Directive 91/271. Moreover, the Commission asked the Kingdom of Sweden to provide clarification on the situation of two agglomerations in respect of which the Commission considered that the Kingdom of Sweden had failed to fulfil its obligations under Article 4(1) and (3) of Directive 91/271.

14 On 25 November 2015, the Kingdom of Sweden replied to the supplementary letter of formal notice.

15 Following receipt of the report drawn up in accordance with Article 15 of Directive 91/271, communicated by the Kingdom of Sweden in 2016, the Commission found that an even greater number of agglomerations in that Member State did not comply with the requirements of that directive.

16 On 28 April 2017, the Commission sent the Kingdom of Sweden a second supplementary letter of formal notice, by which that institution, first, clarified that Article 15 of Directive 91/271 constituted an additional legal basis for the failure of that Member State to fulfil its obligations under that directive and, secondly, mentioned the additional agglomerations identified as not complying with the requirements of Directive 91/271 following the annual report.

17 The Kingdom of Sweden replied to that second supplementary letter of formal notice by letters dated 28 June 2017 and 6 November 2018. In addition, the file relating to the failure to fulfil obligations was discussed at meetings in 2017 and 2018 between the Commission and the Swedish authorities.

18 On 8 November 2018, the Commission sent the Kingdom of Sweden a reasoned opinion in which it found that Member State responsible for the infringement of Article 4 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, in respect of 12 agglomerations and the infringement of Article 5 of that directive, read in conjunction with Articles 10 and 15 thereof, in respect of 9 agglomerations. Since the plants in one of those agglomerations did not comply with both articles, the total number of agglomerations concerned amounted to 20. Moreover, the Commission found that the Kingdom of Sweden also infringed Article 4(3) TEU as regards four agglomerations in respect of which that Member State had relied on the effect of natural retention without, however, providing information to support the claims made in its response to the second supplementary letter of formal notice.

19 The Kingdom of Sweden replied to that reasoned opinion by letters of 11 and 21 January 2019.

20 Since the Commission was not satisfied by those replies, it brought the present action.

The action

21 In support of its action, the Commission raises, in essence, three complaints alleging, first, infringement of Article 4 of Directive 91/271, read in conjunction with Articles 10 and 15 of that directive, secondly, infringement of Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 of that directive and, thirdly, infringement of Article 4(3) TEU.

The first complaint, alleging failure by the Kingdom of Sweden to fulfil its obligations under Article 4 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof

Arguments of the parties

22 The Commission considers, first, that infringement of Article 4 of Directive 91/271 occurs when there is infringement of Article 15 of that directive, which lays down the number of samples to be taken and the intervals at which they are to be taken, in so far as, in the event of non-compliance with that latter article, it is not possible to verify whether the requirements of Article 4 of Directive 91/271 have been met. Secondly, the Commission takes the view that compliance with Article 4 of Directive 91/271, read in conjunction with Article 15 of that directive, is a condition in order for the requirements of Article 10 of that directive, relating to the design, construction, operation and maintenance of treatment plants, to be met.

23 In the first place, the Commission submits that the derogation referred to in Article 4(2) of Directive 91/271 applies only when four cumulative conditions are met, which has not been verified in the present case. According to that institution, in order for an agglomeration to be exempted from the secondary treatment of waste water, first, that waste water must be urban waste water discharged into high mountain regions, defined as regions over 1 500 m above sea level, secondly, it must be difficult to apply an effective biological treatment, thirdly, it must be difficult to apply an effective biological treatment due to low temperatures and, fourthly, detailed studies must indicate that the discharges do not adversely affect the environment.

24 In the second place, the Commission submits that it follows from Article 4(3) of Directive 91/271 that discharges of urban waste water from agglomerations with a load of more than 2 000 p.e. must satisfy the requirements laid down in section B of Annex I to that directive. It states that point B.2 of that annex refers to the requirements in Table 1 thereof, from which it is apparent that the maximum permitted concentration for biochemical oxygen demand ('BOD5') is 25 mg/l and that the minimum percentage of reduction permitted for BOD5 is 70% to 90%, or 40% if the derogation referred to in Article 4(2) of that directive applies. That institution submits that the maximum permitted concentration for chemical oxygen demand ('COD') is 125 mg/l and that the minimum percentage of reduction for COD is 75%. The two parameters for those values are said to be alternatives, and therefore each requirement can be met by complying with the limit value of either the maximum concentration or the minimum percentage of reduction.

25 In the third place, as regards monitoring requirements, which fall within the scope of Article 15(1) of Directive 91/271, read in conjunction with Annex I.D to that directive, the Commission submits that it is clear from the second indent of point D.3 of Annex I to that directive that at least 12 samples must be collected at regular intervals during the year for a load of 10 000 to 49 999 p.e. and 24 samples for a load of 50 000 p.e. or over. If the load is between 2 000 and 9 999 p.e., 12 samples must be collected during the first year. Therefore, where the requirements of Directive 91/271 are met, the collection of four samples per year is said to be sufficient thereafter.

26 In the fourth place, the Commission recalls that, in accordance with point D.4 of Annex I to Directive 91/271, treated waste water is assumed to meet the requirements in respect of the parameters specified in Table 1 of that annex if the number of samples which do not meet the requirements are, as provided for in Table 3 of that annex, 1 for 4 to 7 samples, 2 for 8 to 16 samples, 3 for 17 to 28 samples, 4 for 29 to 40 samples and 5 for 41 to 53 samples. Moreover, the samples, as far as BOD5 and COD are concerned, expressed in concentrations, must not deviate from the limit values by more than 100%.

27 The Commission submits that, on the date set for compliance with the reasoned opinion, namely 9 January 2019, the Kingdom of Sweden was in breach of Article 4 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, in respect of six agglomerations, namely Lycksele, Malå, Mockfjärd, Pajala, Robertsfors and Tänndalen.

28 In the first place, as regards the Lycksele agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 14 000, the Commission submits that the Kingdom of Sweden has acknowledged, in its response to the reasoned opinion, that that agglomeration had not met the requirements for BOD5 or COD, but it stated that those requirements will be met towards the end of 2020. The Commission submits that 24 samples were collected at the Lycksele treatment plant between 7 November 2017 and 6 November 2018, that the BOD5 concentration was higher

than the limit value of 25 mg/l in all samples and that the COD concentration was higher than the limit value of 125 mg/l in 10 samples, whereas the maximum permitted number of non-compliant samples is 4.

29 In the second place, as regards the Malå agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 5 000, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that that agglomeration did not comply with the requirements of maximum concentration values in respect of BOD5 or COD. The Commission submits that, first, 25 samples were taken to verify the COD concentration in the water discharged between 9 November 2017 and 7 November 2018 and that that concentration was higher than the limit value of 125 mg/l in 4 samples, whereas the maximum permitted number of non-compliant samples was 3. Secondly, 13 samples were collected in order to verify the percentage reduction of COD between 9 November 2017 and 7 November 2018 and they showed that that reduction was below the minimum percentage of reduction, namely 70%, in 3 cases, whereas the maximum permitted number of non-compliant samples was 2.

30 With regard to the BOD5 concentration, the Commission submits that this was measured 25 times and that the maximum concentration of 25 mg/l was exceeded in 19 samples, whereas the maximum permitted number of non-compliant samples is 3. It adds that seven samples deviated from the limit value by more than 100%. The Commission disputes in that regard the Kingdom of Sweden's argument that that agglomeration falls within the scope of the derogation referred to in Article 4(2) of Directive 91/271 since it is not situated at an altitude of at least 1 500 m.

31 In the third place, as regards the Mockfjärd agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 3 000, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that 19 samples were taken for the purpose of verifying the BOD5 concentration in the discharged water and 17 samples were collected in respect of the COD concentration between 11 January and 27 December 2018. However, between 17 May and 17 October 2018, no samples were taken. Since point D.3 of Annex I to Directive 91/271 requires that samples be collected at regular intervals during a whole year, the Commission considers that, in the absence of such sampling over a period of five months, neither the requirements relating to monitoring nor those relating to maximum concentration values in respect of BOD5 and COD in those discharges have been met.

32 In the third place, as regards the Pajala agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 2 400, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that 29 samples were collected between 16 November 2017 and 1 November 2018. As far as the COD concentration is concerned, this was more than 125 mg/l in 11 samples, whereas the maximum permitted number of non-compliant samples is 4.

33 As regards the BOD5 concentration, the Commission observes, first, that 20 samples exceeded the maximum concentration of 25 mg/l, whereas the maximum permitted number of non-compliant samples is 4. Secondly, 9 samples deviated from the limit value by more than 100%. Moreover, that institution adds that the reduction of BOD5 in the discharged water was measured 25 times and the results of 12 samples were below the minimum percentage of reduction of 70%, whereas the maximum permitted number of non-compliant samples is 3. The Commission disputes in that regard the Kingdom of Sweden's argument that that agglomeration falls within the scope of the derogation referred to in Article 4(2) of Directive 91/271 since it is not situated at an altitude of at least 1 500 m.

34 In the fifth place, as regards the Robertsfors agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 2 800, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that that agglomeration had experienced some difficulties during 2018 but that it had complied with the requirements of Directive 91/271 since 23 October 2018. The Commission submits that it is apparent from that response that 30 samples were collected for the purpose of verifying the parameters for BOD5 between 20 December 2017 and 12 December 2018. Twenty-one samples were collected and, first, the reduction of BOD5 was below the limit value of 70% on seven occasions during 2018, whereas the maximum permitted number of non-compliant samples is three. Secondly, the BOD5 concentration exceeded the limit value of 25 mg/l on 20 occasions, whereas the maximum permitted number of non-compliant samples is four and, in addition, the value was exceeded by over 100% in eight cases. The Commission disputes in that regard the Kingdom of Sweden's argument that that agglomeration falls within the scope of the derogation referred to in Article 4(2) of Directive 91/271 since it is not situated at an altitude of at least 1 500 m.

35 In the sixth place, as regards the Tänndalen agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 6 000, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that 35 samples were collected for the purpose of verifying the parameters for BOD5 between 3 January and 12 December 2018, but that, since all of them concerned the BOD5 concentration in effluent, no information relating to the percentage of reduction is available. The Commission adds that the BOD5 concentration exceeded the limit value of 25 mg/l in six samples, whereas the maximum permitted number of non-compliant samples is four and that one sample exceeded the maximum concentration by more than 100%.

36 According to the Commission, a letter dated 20 December 2018 from the municipality of Härjedalen, which contains the Tänndalen agglomeration, contradicts the Kingdom of Sweden's claims since it is apparent from that letter that the monitoring for 2018 reveals that the discharge requirement for BOD5 could not be met.

37 The Kingdom of Sweden submits that the position adopted by the Commission, in accordance with which there is an infringement of Article 4 of Directive 91/271 since there is an infringement of Article 15 of that directive, cannot be accepted since points B and D of Annex I to Directive 91/271 provide only brief indications as to the construction of treatment plants and the collection of samples and do not lay down specific criteria.

38 Accordingly, the Kingdom of Sweden submits that it follows from the case-law of the Court that a single sample meeting the requirements laid down in Annex I.B to Directive 91/271 is sufficient to prove that the obligations deriving from Article 4 of that directive have been complied with by the Member State concerned. The Kingdom of Sweden takes the view that the Commission's argument that a Member State must prove that compliant samples have been collected over a period of 12 months in order for the discharge requirements in Article 4 of Directive 91/271, read in conjunction with Article 15 thereof, to be regarded as having been complied with, cannot be accepted.

39 The Kingdom of Sweden submits that such an interpretation would frustrate the purpose of the pre-litigation procedure in so far as, inter alia, the Commission grants the Member State concerned a period of time, usually two months, to comply with the reasoned opinion. If that Member State has to prove that compliant samples have been collected for a period of 12 months, it is impossible for it to comply with such a request.

40 The Kingdom of Sweden considers that the Commission has misinterpreted Article 4(2) of Directive 91/271 in so far as that institution considers that that derogation applies only to regions which are over 1 500 m above sea level. That Member State takes the view that the decisive factor which permits the application of the derogation referred to in that provision is the low temperatures which make it difficult to apply an effective treatment, as is expressly stated in the wording of Article 4(2) of Directive 91/271.

41 In the first place, as regards the Lycksele agglomeration, while the Kingdom of Sweden does not dispute that the BOD5 and COD concentration values found in its treatment plant do not comply with the requirements of Directive 91/271, it states that works are under way to remedy that situation and that it is expected that the requirements of that directive will be met by the end of 2020 or the beginning of 2021.

42 In the second place, as regards the Malå agglomeration, the Kingdom of Sweden does not dispute that it does not comply with the requirements of Directive 91/271 as regards the COD concentration values laid down in that directive. By contrast, the Kingdom of Sweden considers that, as far as the BOD5 concentration values are concerned, that agglomeration must benefit from the derogation provided for in Article 4(2) of that directive on account of the low temperatures in that agglomeration. In any event, that Member State submits that it was expected that the Malå treatment plant would comply with the requirements of Article 4 of Directive 91/271 during spring 2021 at the latest.

43 In the third place, as regards the Mockfjärd agglomeration, the Kingdom of Sweden submits that the results of the monitoring of BOD5 concentration values carried out between 11 January and 27 December 2018 and the monitoring of COD concentration values between 19 December 2017 and 6 December 2018 show that that agglomeration complied with the requirements of Directive 91/271. That Member State submits that, first, as regards BOD5, 3 of the 19 samples had a concentration of more than 25 mg/l O_2, which corresponds to the permitted number of non-compliant samples. Secondly, as regards the COD concentration requirements, all but one of the samples complied as the concentration found was less than 125 mg/l O_2.

44 Moreover, samples were not taken between 17 May and 17 October 2018 on account of works at the treatment plant. According to the Kingdom of Sweden, only four samples had to be collected from that agglomeration during 2018 in order to meet the requirements of Directive 91/271, since, on the basis of the samples collected during 2017, the results of the monitoring showed that the treatment plant met the requirements of that directive for both BOD5 and COD.

45 In the fourth place, as regards the Pajala agglomeration, the Kingdom of Sweden does not dispute that the treatment plant does not comply with the requirements of Directive 91/271 relating to permitted COD values, but it does comply with those for BOD5. In that regard, in view of the low temperatures and on account of the fact that the existing documentation states that discharges from the Pajala treatment plant are relatively low and do not adversely affect the environment, the derogation referred to in Article 4(2) of Directive 91/271 should apply. In any event, the Kingdom of Sweden submits that a new treatment plant will be built in that agglomeration and it is expected that the requirements of Article 4(1) of that directive in respect of discharges will be met during spring or summer 2022.

46 In the fifth place, as regards the Robertsfors agglomeration, the Kingdom of Sweden considers that that agglomeration complies with the requirements of Directive 91/271 relating to maximum concentration values in respect of BOD5 since the derogation provided for in Article 4(2) of that directive is applicable to it. Moreover, that Member State submits that, during 2018, the Robertsfors treatment plant experienced several operational incidents, which have been remedied. The results collected between 20 December 2017 and 12 December 2018 are said to show that, since 23 October 2018, that treatment plant has met the requirements of Article 4 of Directive 91/271 as far as BOD5 concentration is concerned, since all six samples collected after that date show a percentage reduction of BOD5 concentration of over 70%.

47 In the sixth place and finally, as regards the Tänndalen agglomeration, the Kingdom of Sweden submits that, as far as the period from 3 January to 12 December 2018 is concerned, discharges from the Tänndalen treatment plant exceeded the maximum concentration values in respect of BOD5 until 18 April 2018. However, since 16 May 2018, all samples collected have shown that the waste water discharged had values which were below the maximum concentration threshold of 25 mg/l O_2. The Kingdom of Sweden considers that, since all of the samples collected between 16 May 2018 and 15 May 2019 have values below the maximum permitted concentration of 25 mg/l O_2, that agglomeration complies with the requirements of Directive 91/271.

Findings of the Court

– *Preliminary observations*

48 In the first place, it should be noted that, first, under Article 4 of Directive 91/271, Member States are to ensure that urban waste water entering collecting systems is subject to secondary treatment or an equivalent treatment before discharge. Secondly, under Article 5(2) and (3) of that directive, they must ensure that urban waste water entering collecting systems is subject to more stringent treatment than that described in Article 4 of that directive before discharge into sensitive areas. In both cases, discharges must satisfy the requirements of section B of Annex I to that directive.

49 In the second place, the Court has held that, where a Member State is able to present a sample which satisfies the requirements of Annex I.B to Directive 91/271, the obligations deriving from Article 4 of that directive must be regarded as having been complied with since that article does not require sampling to be carried out, as provided for in Annex I.D to that directive, for a whole year. There is nothing to suggest that the situation is any different as regards compliance with the obligations arising from Article 5 of Directive 91/271, which, moreover, does not refer to the provisions of Annex I.D to Directive 91/271 (judgment of 10 March 2016, *Commission* v *Spain*, C-38/15, not published, EU:C:2016:156, paragraph 24).

50 In the third place, a distinction must be drawn between the Member States' obligations as to the result to be achieved under Articles 4 and 5 of Directive 91/271, in order to verify that discharges from urban waste water treatment plants comply with the requirements of Annex I.B to that directive, and the continuous obligation to which they are subject under Article 15 of that directive in order to ensure that, over time, those discharges meet the quality requirements which apply from the time when the treatment plant is brought into operation (judgment of 10 March 2016, *Commission* v *Spain*, C-38/15, not published, EU:C:2016:156, paragraph 25).

51 It follows that Article 15 of Directive 91/271 has an autonomous scope and a different objective from Articles 4 and 5 thereof. Accordingly, any breach of the monitoring obligations under Article 15 does not automatically entail a breach of the requirements laid down in Articles 4 and 5.

52 Consequently, the Commission's argument that an infringement of Article 4 or 5 of Directive 91/271 occurs when there is an infringement of Article 15 of that directive cannot succeed.

53 Moreover, with regard to the interpretation of Article 4(2) of Directive 91/271, as the Advocate General noted in point 32 of her Opinion, that provision is unambiguously limited to clearly delimited high mountain regions over 1 500 m above sea level. Therefore, the interpretation of that provision put forward by the Kingdom of Sweden, as set out in paragraph 40 of the present judgment, would lead to a *contra legem* interpretation of that provision, and therefore it cannot be accepted (see, to that effect, judgment of 1 October 2020, *Entoma*, C-526/19, EU:C:2020:769, paragraph 43).

54 Consequently, the Kingdom of Sweden's argument alleging that the derogation provided for in Article 4(2) of Directive 91/271 applies must be rejected.

55 The existence of a failure to fulfil obligations in respect of the agglomerations which are the subject of the present action must be assessed in the light of those observations.

– *The agglomerations Malå, Pajala and Lycksele*

56 As regards the agglomerations Malå, Pajala and Lycksele, it should be noted that the parties agree that the COD concentration values are higher than those permitted under Article 4(3) of and Annex I.B to Directive 91/271. With regard to the last agglomeration, the parties also agree that the BOD5 concentration is higher than that permitted by those provisions.

57 In order to justify the alleged failure to fulfil obligations, the Kingdom of Sweden claimed, first, with regard to the Lycksele agglomeration, that the requirements for COD and BOD5 concentrations would be complied with towards the end of 2020. Secondly, with regard to the BOD5 concentration in the agglomerations Malå and Pajala, without disputing the fact that the BOD5 concentrations exceed those permitted by Article 4(3) of and Annex I.B to Directive 91/271, the Kingdom of Sweden nonetheless relied on the derogation provided for in Article 4(2) of that directive.

58 In that regard, first, it should be noted that, as the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, the Court cannot take account, in that regard, of any subsequent changes (judgment of 5 March 2020, *Commission* v *Cyprus (Collection and treatment of urban waste water)*, C-248/19, not published, EU:C:2020:171, paragraph 22 and the case-law cited).

59 In the present case, since the time limit set in the reasoned opinion was 8 January 2019, possible compliance with the requirements of Directive 91/271 after that date cannot be taken into account.

60 Secondly, as is clear from paragraphs 53 and 54 of this judgment, the derogation provided for in Article 4(2) of Directive 91/271 cannot usefully be relied on by that Member State and therefore the failure to fulfil the obligations referred to in Article 4 of Directive 91/271 must be declared well founded.

61 Moreover, with regard to the obligation laid down in Article 10 of that directive, in accordance with which treatment plants must be designed, constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions, compliance with that obligation presupposes inter alia that the requirements laid down in Article 4 of that directive are met (judgment of 5 March 2020, *Commission* v *Cyprus (Collection and treatment of urban waste water)*, C-248/19, not published, EU:C:2020:171, paragraph 37 and the case-law cited).

62 Consequently, that obligation cannot be considered to be fulfilled in the agglomerations where the obligation to subject all urban waste water to secondary or equivalent treatment, as provided for in Article 4 of Directive 91/271, has not been complied with (judgment of 5 March 2020, *Commission* v *Cyprus (Collection and treatment of urban waste water)*, C-248/19, not published, EU:C:2020:171, paragraph 38 and the case-law cited).

63 In those circumstances, it must be held that, by not ensuring that, before it is discharged, the waste water from the agglomerations Lycksele, Malå and Pajala is subject to secondary treatment or an equivalent treatment, the Kingdom of Sweden has failed to fulfil its obligations under Article 4 in conjunction with Article 10 of Directive 91/271.

– *Mockfjärd agglomeration*

64 As regards the Mockfjärd agglomeration, it should be noted that the Commission considers that, on account of the fact that no samples were collected between 16 May and 18 October 2018, in accordance with point D.3 of Annex I to Directive 91/271, the Kingdom of Sweden has failed to fulfil its obligations under Article 4 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof.

65 The Commission does not dispute, with regard to the BOD5 concentration, that, between 11 January and 27 December 2018, only 3 of the 19 samples collected had a concentration higher than that permitted by Directive 91/271. Nor does the Commission dispute, with regard to the COD concentration, that, between 19 December 2017 and 6 December 2018, all but one of the samples complied with the requirements in Table 3 of Annex I to Directive 91/271, in accordance with which a maximum of three non-compliant samples is permitted from 17 to 28 samples taken per year.

66 Accordingly, it must be considered that the Commission is seeking to establish the failure to fulfil obligations under Article 4 of that directive solely on the ground that samples were not collected at regular intervals, in accordance with Article 15 of that directive, read in conjunction with point D.3 of Annex I thereto.

67 First, the Commission's argument that infringement of Article 15 of Directive 91/271 automatically entails infringement of Article 4 of that directive has been rejected in paragraph 51 of this judgment.

68 Secondly, as is clear from paragraph 49 of this judgment, where a Member State is able to present a sample which satisfies the requirements of Annex I.B to Directive 91/271, the obligations deriving from Article 4 of that directive must be regarded as having been complied with since that article does not require sampling to be carried out, as provided for in Annex I.D to that directive, for a whole year.

69 In those circumstances, the Commission's action must be dismissed as regards the Mockfjärd agglomeration.

– *Robertsfors agglomeration*

70 As regards the Robertsfors agglomeration, it should be noted, first, that the Kingdom of Sweden does not dispute that, during 2018, the treatment plant for that agglomeration experienced several operational incidents, which have been remedied. Secondly, the Commission does not dispute that, since 23 October 2018, all six samples taken to monitor the BOD5 concentration showed a reduction of at least 70%, which complied with the requirements of Article 4 of Directive 91/271.

71 As a preliminary point, as is clear from paragraphs 53 and 54 of this judgment, the Kingdom of Sweden's argument alleging that the derogation provided for in Article 4(2) of Directive 91/271 is applicable must be rejected.

72 In addition, first, the Commission's argument that infringement of Article 15 of Directive 91/271 automatically entails infringement of Article 4 of that directive has been rejected in paragraph 51 of this judgment.

73 Secondly, as is clear from paragraphs 48 to 52 of this judgment, Article 4 of Directive 91/271 does not refer to Annex I.D to that directive, and therefore, since the Kingdom of Sweden is able to present a sample which satisfies the requirements of Annex I.B to that directive for the period covered by the present action, the obligations deriving from Article 4 of that directive must be regarded as having been complied with.

74 In the present case, the parties do not dispute that, since 23 October 2018, all six samples taken to monitor the BOD5 concentration have complied with the requirements of Directive 91/271.

75 Accordingly, the Commission's action must be dismissed as regards the Robertsfors agglomeration.

– *Tänndalen agglomeration*

76 As regards the Tänndalen agglomeration, the parties do not dispute that 35 samples were taken to monitor the BOD5 concentration between 3 January and 12 December 2018 and that 6 of those samples exceeded the concentration permitted by Directive 91/271, with the result that, until 18 April 2018, the treatment plant for that agglomeration did not comply with the requirements of that directive.

77 The Kingdom of Sweden submits that all of the samples collected between 16 May 2018 and 15 May 2019 revealed that the waste water discharged had values which were below the maximum concentration threshold.

78 In that regard, as recalled in paragraphs 58 and 59 of this judgment, since the time limit set in the reasoned opinion was 8 January 2019, possible compliance with the requirements of Directive 91/271 after that date cannot be taken into account.

79 However, first, the Commission's argument that infringement of Article 15 of Directive 91/271 automatically entails infringement of Article 4 of that directive has been rejected in paragraph 51 of this judgment.

80 Secondly, as is also clear from paragraphs 48 to 52 of this judgment, Article 4 of Directive 91/271 does not refer to Annex I.D to that directive, and therefore, since the Kingdom of Sweden is able to present a sample which satisfies the requirements of Annex I.B to that directive for the period covered by the present action, the obligations on that Member State under Article 4 of that directive must be regarded as having been complied with.

81 In the present case, all of the samples collected between 16 May 2018 and 8 January 2019 complied with the requirements laid down in Directive 91/271.

82 It follows that the Commission's action must be dismissed as regards the Tänndalen agglomeration.

The second complaint, alleging failure by the Kingdom of Sweden to fulfil its obligations under Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof

Arguments of the parties

83 The Commission considers, first, that infringement of Article 5 of Directive 91/271 occurs when there is infringement of Article 15 of that directive, which lays down the number of samples to be taken and the intervals at which they are to be taken, in so far as, in the event of non-compliance with that latter article, it is not possible to verify whether the requirements of Article 5 of Directive 91/271 have been met. Secondly, the Commission takes the view that compliance with that provision, read in conjunction with Article 15 of that directive, is a condition in order for the requirements of Article 10 of that directive, relating to the design, construction, operation and maintenance of treatment plants, to be regarded as having been met.

84 The Commission submits that it follows from Article 5(2) of Directive 91/271 that discharges of urban waste water from agglomerations of more than 10 000 p.e. must be subject to more stringent treatment than that provided for in Article 4 of that directive. It states that it is apparent from Article 5(3) of that directive that such discharges must satisfy the relevant requirements of section B of Annex I to the directive, which refers to Tables 1 and 2 of that annex.

85 The Commission points out that the two criteria, which apply as alternatives, concern nitrogen in the waste water, namely the maximum permitted concentration for nitrogen which is 15 mg/l for agglomerations of between 10 000 and 100 000 p.e. and 10 mg/l for agglomerations of more than 100 000 p.e., and the minimum percentage of reduction of nitrogen which must be between 70% and 80%. Moreover, the Commission submits that point D.4.a of Annex I to Directive 91/271 provides that treated waste water is assumed to meet the requirements in Table 2 of that annex in respect of nitrogen if the annual mean of the samples does not exceed the applicable limit value.

86 The Commission submits that, with regard to the agglomerations Borås, Skoghall, Habo and Töreboda, the Kingdom of Sweden has failed to fulfil its obligations under Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof.

87 In the first place, as regards the Borås agglomeration, whose treatment plants treated or are treating waste water for a p.e. of 110 000 and 150 000 respectively, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that the former treatment plant, which was shut down on 28 May 2018, did not comply with the requirements of Directive 91/271, but the new plant has complied with those requirements since 17 September 2018.

88 The Commission submits that the table of results relating to nitrogen concentrations, submitted by the Kingdom of Sweden, does not enable it to be determined which results come from which treatment plant and, in any event, that table shows that the requirements of Directive 91/271 relating to maximum concentration values in respect of nitrogen were not complied with during the period from 1 November 2017 to 31 October 2018. During that one-year period, the annual mean value of the samples was 18 mg/l, whereas the limit value is 10 mg/l.

89 In the second place, as regards the Skoghall agglomeration, whose treatment plants have a waste water treatment capacity for a p.e. of 5 457 and 15 000 respectively, the Commission submits that it is apparent from the response to the reasoned opinion that at one of the two treatment plants, the concentration limit value in respect of nitrogen was exceeded during the 12-month period from 9 November 2017 and 6 November 2018, which has not been contested by the Kingdom of Sweden. In that regard, the Commission states that the annual mean value of the samples was 17 mg/l whereas the limit value is 15 mg/l.

90 In the third place, as regards the Habo agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 17 000, the Commission considers that only 33% of nitrogen has been removed at that plant and that the Kingdom of Sweden has not substantiated its claims that the nitrogen reduction between Habo and the Baltic Sea was 78 to 87%. According to the Commission, the Hydrological Predictions for the Environment model ('the HYPE model') does not make it possible to determine whether or not the Habo agglomeration complies with the requirements of Directive 91/271. The Commission states that it is apparent from the HYPE model that the nitrogen reduction in all lakes and watercourses between Habo and the Baltic Sea is 87%, before the waste water reaches the sensitive coastal area. Furthermore, an official statement from the Sveriges meteorologiska och hydrologiska institut (Swedish Meteorological and Hydrological Institute, 'the SMHI') is said to indicate that the total reduction in nitrogen, which also takes into account natural retention, is 91%.

91 The Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion, first, that the annual mean value of the reduction in the concentration of nitrogen found at the Habo treatment plant is only 32% and, secondly, that that treatment plant is not even equipped to treat nitrogen. The Commission considers that, although the Kingdom of Sweden relies on the HYPE model, it has not provided the relevant information in order to verify the data claimed, and therefore the Commission considers that the nitrogen reduction for Habo is 32%, whereas the minimum percentage of reduction must be between 70% and 80%.

92 In the fourth place, as regards the Töreboda agglomeration, whose treatment plant has a waste water treatment capacity for a p.e. of 35 500, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that that Member State has

submitted, first, that the requirements for BOD5 concentration had been complied with. Secondly, for essentially the same reasons as those given in respect of the Habo agglomeration, it submitted that the reduction in the concentration of nitrogen achieved by the Töreboda treatment plant was 43%, that percentage reaching 71% when taking into account natural retention before the waste water reaches sensitive coastal areas.

93 The Commission submits that it is apparent from that response that 50 samples were collected for the purpose of verifying the BOD5 concentration at the Töreboda treatment plant between 8 November 2017 and 6 November 2018. However, according to that institution, samples were not collected from incoming and outgoing water between 8 November 2017 and 3 January 2018 and therefore the reduction was not declared for that period and the monitoring requirements in point D.3 of Annex I to Directive 91/271 were not complied with.

94 In addition, the Commission submits that the maximum concentration of 25 mg/l was exceeded in 18 samples, whereas the maximum permitted number of non-compliant samples was 5, and that 3 samples exceeded the maximum concentration by more than 100%. It states that since that agglomeration has not complied with the requirements arising from Article 4 of Directive 91/271, it has also failed to comply with those under Article 5 of that directive, which imposes the obligation of more stringent treatment for treatment plants with a p.e. of more than 10 000.

95 As regards the reduction in the concentration of nitrogen, the Commission submits that it is apparent from the Kingdom of Sweden's response to the reasoned opinion that, first, the annual mean value of the reduction in nitrogen at the treatment plant is 43%, whereas the minimum percentage of reduction must be between 70% and 80% and, secondly, that treatment plant is not equipped to treat nitrogen. The Commission states that it has not been sent any information which would enable the information provided by the Kingdom of Sweden or the information after 2013 to be verified.

96 As a preliminary point, for the same reasons as those put forward in connection with the complaint alleging failure to fulfil obligations deriving from Article 4 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, the Kingdom of Sweden disputes the Commission's argument that infringement of Article 15 entails infringements of Articles 5 and 10 of that directive.

97 In the first place, with regard to the Borås agglomeration, the Kingdom of Sweden considers that the Commission's argument that it is not possible to identify which treatment plant the results it has reported concern cannot be accepted. According to the Kingdom of Sweden, it is clear from its response to the reasoned opinion that the Gässlösa treatment plant was in operation until 28 May 2018 and that, as of that date, the Sobacken plant has been in operation. In that regard, the Kingdom of Sweden submits that, for the entire period between 28 May 2018 and 9 May 2019, the concentration of nitrogen in the waste water discharged by that plant was below the annual mean limit value of 10 mg/l and therefore that plant complies with the requirements of Directive 91/271.

98 In the second place, with regard to the Skoghall agglomeration, which uses two treatment plants, the Kingdom of Sweden submits that the samples collected at the Sättersviken plant showed a nitrogen concentration of 17 mg/l on account of difficulties caused by the melting of the snow, combined with a long period of low temperatures. Measures are said to have been taken to

remedy that problem with the result that, between 4 June 2018 and 15 May 2019, the concentration of nitrogen in the water discharged by the Sättersviken treatment plant was below the annual mean limit value of 15 mg/l.

99 In the third place, with regard to the Habo agglomeration, the Kingdom of Sweden submits that the analysis of 26 samples, collected between 14 November 2017 and 13 November 2018, shows that the percentage reduction in the nitrogen load at the Habo treatment plant was on average 32%. However, the Kingdom of Sweden submits that the concentration of nitrogen in the water discharged by that treatment plant is reduced by 87% as a result of natural retention which, according to the case-law of the Court, may be taken into account for the purpose of calculating the reduction in the nitrogen load.

100 It states that it is clear from the SMHI statement, which is itself based on data available on the website of the *Sveriges lantbruksuniversitet* (Swedish University of Agricultural Sciences, 'the SLU'), that the HYPE model shows the percentage of natural reduction in the nitrogen load between the treatment plant and the sea as being up to 87%. In so far as the Habo treatment plant achieves a 32% reduction in nitrogen and the natural retention amounts to 87%, the total retention being 91%, the Kingdom of Sweden considers that it complies with the requirements of Directive 91/271 in that regard.

101 In the fourth place, with regard to the Töreboda agglomeration, the Kingdom of Sweden submits that, as far as BOD5 concentration is concerned, first, it is clear from Table 2 of Annex I to Directive 91/271 that the concentration values and percentages of reductions are applied as alternatives. Secondly, it is clear from Table 3 of that annex that if the number of samples taken in any year must be between 17 and 28, a maximum of 3 of them may fail to conform. Between 4 January and 11 October 2018, 22 of the 23 samples collected at regular intervals met the requirements for the minimum percentage of reduction, whereas that plant had to take only 12 samples during that year.

102 With regard to nitrogen retention, the Kingdom of Sweden submits that, between 10 November 2017 and 6 November 2018, the percentage reduction in the nitrogen load at the Töreboda treatment plant, determined on the basis of 54 samples, was 32%, whereas the reduction due to natural retention resulted in a 50% reduction in that load.

103 According to the Kingdom of Sweden, it is clear from the SMHI statement, which is itself based on data available on the SLU's website, that the HYPE model shows the percentage of natural reduction in the nitrogen load between the treatment plant and the sea as being up to 50%. Taking into account the fact that the reduction in the treatment plant amounts to 43%, the total nitrogen retention is up to 71%.

Findings of the Court

104 As a preliminary point, it should be noted that the failure to fulfil the obligations deriving from Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, must be examined in the light of paragraphs 48 to 52 of this judgment.

– *Töreboda agglomeration*

105 The Commission, in essence, alleges that the Kingdom of Sweden has infringed Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, on account of the fact that, first, the treatment plant in that agglomeration does not comply with the requirements of Article 4 of that directive, relating to BOD5 concentration, and therefore it cannot, a fortiori, comply with the more stringent requirements of Article 5 thereof. Secondly, the Commission considers that the requirements concerning the nitrogen content of treated water have not been complied with either.

106 In that regard, first, the Commission's argument that infringement of Article 15 of Directive 91/271 automatically entails infringement of Article 5 of that directive was rejected in paragraph 51 of this judgment.

107 Secondly, as is clear from paragraphs 48 to 52 of this judgment, Article 5 of Directive 91/271 does not refer to Annex I.D to that directive, and therefore, since the Kingdom of Sweden is able to present a sample which satisfies the requirements of Annex I.B to that directive for the period covered by the present action, the obligations deriving from Article 5 of that directive must be regarded as having been complied with.

108 In that regard, although it is common ground between the parties that the Kingdom of Sweden submitted 50 samples for the period from 8 November 2017 to 6 November 2018, that Member State disputes the fact that 9 non-compliant samples during the first half of 2018 show that the treatment plant for that agglomeration does not reduce the BOD5 concentration sufficiently.

109 However, given that, in order to comply with the obligations under Article 5 of Directive 91/271, that Member State may confine itself to producing a single sample meeting the requirements of Annex I.B to Directive 91/271, the exact number of non-compliant samples is irrelevant when assessing whether there has been a failure to fulfil obligations deriving from that article.

110 Since the Commission does not dispute that the Kingdom of Sweden submitted at least one sample which complies with the requirements of Annex I.B to Directive 91/271, the action must be dismissed in so far as it concerns the BOD5 concentration in the Töreboda agglomeration.

111 As regards the percentage reduction in the concentration of nitrogen in those waters, it should be recalled that, first, under Article 5(2) of Directive 91/271, the competent authorities must take the necessary measures to ensure that urban waste water entering collecting systems is before discharge into sensitive areas subject to more stringent treatment than that described in Article 4 of that directive, by 31 December 1998 at the latest, for all discharges from agglomerations of more than 10 000 p.e.

112 Secondly, Article 5(3) of Directive 91/271 refers to section B of Annex I to that directive which, in turn, refers to the requirements shown in Table 2 of that annex. That table requires, in respect of nitrogen, either a reduction enabling a value of 15 mg/l for agglomerations of between 10 000 and 100 000 p.e. to be achieved, or a minimum percentage of reduction of 70 to 80%.

113 Thus, the Court has already held that no provision of Directive 91/271 precludes regarding natural retention of nitrogen as a method for removing nitrogen from urban waste water (judgments of 6 October 2009, *Commission* v *Finland*, C-335/07, EU:C:2009:612, paragraph 86, and of 6 October 2009, *Commission* v *Sweden*, C-438/07, EU:C:2009:613, paragraph 97).

114 In the present case, although the Kingdom of Sweden does not dispute that the treatment plant for the Töreboda agglomeration has no special equipment for reducing the concentration of nitrogen in the waste water and therefore removes only approximately 43% of it, that Member State submits that the natural retention of a further 50% must be taken into account, with the result that the nitrogen in the waste water is reduced by 71% in total before it reaches the sensitive coastal waters.

115 In that regard, in the first place, as noted by the Advocate General in points 109 and 110 of her Opinion, although the Commission argued that the Kingdom of Sweden had not provided the required data to enable it to verify the allegations concerning the natural retention of nitrogen, it did not specify, either in the reasoned opinion or in its written pleadings, precisely which measurement data it needed in order to be able to verify the HYPE model, and therefore the Kingdom of Sweden was unable to provide precisely the data requested by the Commission.

116 In the second place, in so far as the Kingdom of Sweden referred to the data available on the SLU's website, it has thereby challenged in substance and in detail the information produced by the Commission and the consequences flowing therefrom (see, by analogy, judgment of 18 October 2012, *Commission* v *United Kingdom*, C-301/10, EU:C:2012:633, paragraph 72 and the case-law cited).

117 In those circumstances, as the Advocate General stated in point 111 of her Opinion, the Commission should have analysed the content of the data available on the internet in question and, where appropriate, it should have requested, if necessary, an extension of the time limit or a stay of proceedings.

118 Since, first, the Commission has not requested, clearly and precisely, specific measures to verify the HYPE model and, secondly, it has been unable to challenge convincingly the Kingdom of Sweden's argument concerning the natural retention of nitrogen, it must be found that it has not succeeded in demonstrating the infringement of Article 5 of Directive 91/271 in respect of the discharge of nitrogen by the treatment plant for the Töreboda agglomeration.

119 In those circumstances, the action for failure to fulfil obligations must be dismissed as regards the Töreboda agglomeration.

– *Borås agglomeration*

120 With regard to the Borås agglomeration, the failure to fulfil the obligations relating to limit values and the reduction of the nitrogen concentration in waste water, referred to in Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, must be examined in the light of paragraphs 111 to 113 of this judgment.

121 In the present case, it should be noted that, as the Advocate General noted in points 95 to 97 of her Opinion, although, on account of the replacement of the former waste water treatment plant in that agglomeration on 28 May 2018, the Kingdom of Sweden initially reported an annual mean nitrogen concentration value of 18 mg/l nitrogen for both plants, the fact remains that, in its defence, that Member State submitted additional data from samples collected between 28 May 2018 and 5 September 2019 which demonstrate an annual mean of 9 mg/l and an average reduction of 70% in the concentration of nitrogen.

122 As is clear from paragraphs 58 and 59 of this judgment, since the time limit set in the reasoned opinion was 8 January 2019, possible compliance with the requirements of Directive 91/271 after that date cannot be taken into account.

123 That said, first, since the Commission's argument that infringement of Article 15 of Directive 91/271 automatically entails infringement of Article 5 of that directive was rejected in paragraph 51 of this judgment and, secondly, since the Kingdom of Sweden has produced samples which comply with the requirements of that directive for the period from 28 May 2018 to 8 January 2019, it must be found that the treatment plant for the Borås agglomeration complied with the requirements imposed by Articles 5 and 10 of that directive on the latter date.

124 In those circumstances, the action for failure to fulfil obligations must be dismissed as regards the Borås agglomeration.

– *Skoghall agglomeration*

125 With regard to the Skoghall agglomeration, the failure to fulfil the obligations relating to limit values and the reduction of the nitrogen concentration in waste water, referred to in Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, must be examined in the light of paragraphs 111 to 113 of this judgment.

126 In the present case, as the Advocate General pointed out in points 102 and 103 of her Opinion, although the Kingdom of Sweden has acknowledged that, for one of the treatment plants in that agglomeration, the annual mean concentration of nitrogen in the water treated by that plant, for the period from 9 November 2017 to 6 November, was 17 mg/l, the fact remains that, in its defence, that Member State submitted additional data from samples collected between 6 April 2018 and 15 May 2019 which demonstrate an annual mean of 12 mg/l and an average reduction of 73% in the concentration of nitrogen.

127 As is clear from paragraphs 58 and 59 of this judgment, since the time limit set in the reasoned opinion was 8 January 2019, possible compliance with the requirements of Directive 91/271 after that date cannot be taken into account.

128 That said, first, since the Commission's argument that infringement of Article 15 of Directive 91/271 automatically entails infringement of Article 5 of that directive was rejected in paragraph 51 of this judgment and, secondly, since the Kingdom of Sweden has produced samples which comply with the requirements of that directive for the period from 6 April 2018 to 8 January 2019, it must be found that the treatment plant for the Skoghall agglomeration complied with the requirements set out in Articles 5 and 10 of that directive on the latter date.

129 In those circumstances, the action for failure to fulfil obligations must be dismissed as regards the Skoghall agglomeration.

– *Habo agglomeration*

130 With regard to the Habo agglomeration, the failure to fulfil the obligations relating to limit values and the reduction of the nitrogen concentration in waste water, referred to in Article 5 of Directive 91/271, read in conjunction with Articles 10 and 15 thereof, must be examined in the light of paragraphs 111 to 113 of this judgment.

131 In the present case, although the Kingdom of Sweden does not dispute that the treatment plant for the Habo agglomeration has no special equipment for reducing the concentration of nitrogen in the waste water and therefore removes only approximately 30% of it, which results in an annual mean of 40 mg/l, that Member State submits that the natural retention of a further 87% must be taken into account, with the result that the nitrogen in the waste water is reduced by 91% in total before it reaches the sensitive coastal waters.

132 In that regard, in the first place, as noted by the Advocate General in points 109 and 110 of her Opinion, although the Commission argued that the Kingdom of Sweden had not sent it the required data to enable it to verify the allegations by that Member State concerning the natural retention of nitrogen, it did not specify, either in the reasoned opinion or in the court proceedings, precisely which measurement data it needed in order to be able to verify the HYPE model, and therefore the Kingdom of Sweden was unable to provide precisely the data requested by the Commission.

133 In the second place, as is clear from points 110 and 111 of that Opinion, the Kingdom of Sweden referred to the data available on the SLU's website and therefore the Commission should have analysed the content of the data available on that website and, where appropriate, it should have requested, if necessary, an extension of the time limit or a stay of proceedings.

134 Since, first, the Commission has not requested, clearly and precisely, specific measures to verify the HYPE model and, secondly, it has been unable to challenge convincingly the Kingdom of Sweden's argument concerning the natural retention of nitrogen, it must be found that it has not succeeded in demonstrating the infringement of Article 5 of Directive 91/271 in respect of the discharge of nitrogen in the Habo agglomeration.

135 In those circumstances, the action for failure to fulfil obligations must be dismissed as regards the Habo agglomeration.

The third complaint, alleging failure by the Kingdom of Sweden to fulfil its obligations under Article 4(3) TEU

Arguments of the parties

136 The Commission submits that, by failing to send it the relevant data relating to the agglomerations Habo and Töreboda, so as to enable that institution to verify the arguments put forward by the Kingdom of Sweden in respect of the infringements alleged against it with regard to those two agglomerations, that Member State has failed to fulfil its obligations under Article 4(3) TEU.

137 In that regard, the Commission submits that it is not sufficient for a Member State to make mere allegations without giving that institution the means to verify their veracity. Accordingly, the Commission submits that, although the Kingdom of Sweden claims that the HYPE model, used in the calculation of nitrogen retention, is based on actual measures, that institution has not received any information with regard to retention calculated on an individual basis for each agglomeration, and therefore it has been unable to verify those claims.

138 More specifically, the Commission states that it was not in a position either to check whether the natural retention of nitrogen was in the proportions alleged or to carry out an objective scientific assessment of the veracity of the Kingdom of Sweden's claims as to the methods used to determine

the retention percentage. In that regard, the Commission submits that, since it does not itself have investigative powers in that regard, the principle of sincere cooperation requires a Member State to provide it with the necessary information to determine whether the provisions of a directive have been implemented correctly.

139 In the present case, the data that are said to have been communicated to the Commission, on which the SMHI's official statement is based, are said to come from a database which is not hosted by the SMHI and which does not specify the nitrogen content in watercourses for the period after 2013. The Commission adds that even the data from that database do not make it possible to determine the extent of the nitrogen retention.

140 The Kingdom of Sweden replies that, first, it did submit the relevant information and, secondly, such information comes from environmental monitoring data which are freely available on the SLU's website, the SLU having collected data concerning fresh waters as part of the environmental monitoring. The SMHI is said to use those data for its validation and calibration work.

141 Moreover, the Kingdom of Sweden submits that both the HYPE model and the previous models on which it is based are well documented and have been the subject of scientific tests and trials with results published in a number of scientific studies and articles. That Member State submits that two scientific studies demonstrate that the model is reliable and stresses, first, that the validations and calibrations are conducted in relation to data measured by the SLU and, secondly, that the studies cited state that the SMHI website has a tool which enables users to view the average difference, expressed as a percentage, between the model's values and the measured data.

142 Furthermore, in its reply to the letter of formal notice dated 28 June 2017, the Kingdom of Sweden states that it provided detailed explanations regarding the HYPE model and provided the Commission with information from the SMHI stating how nitrogen transportation and losses occur and the final natural retention thus obtained in Habo and Töreboda. Accordingly, that Member State concludes that it has done everything possible to cooperate with the Commission.

Findings of the Court

143 It should be noted that, according to settled case-law relating to the burden of proof in proceedings for failure to fulfil an obligation under Article 258 TFEU, it is for the Commission to determine whether the obligation has not been fulfilled. It is the Commission that must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 14 January 2021, *Commission* v *Italy (Contribution towards the purchase of motor fuel)*, C-63/19, EU:C:2021:18, paragraph 74 and the case-law cited).

144 The Member States are nevertheless required, under Article 4(3) TEU, to facilitate the achievement of the Commission's tasks, which consist inter alia, pursuant to Article 17(1) TEU, in ensuring that the provisions of the FEU Treaty and the measures taken by the institutions pursuant thereto are applied. In particular, account should be taken of the fact that, where it is a question of checking that the national provisions intended to ensure effective implementation of a directive are applied correctly in practice, the Commission, which does not have investigative powers of its own in the matter, is largely reliant on the information provided by any complainants and by the Member State concerned (judgment of 18 October 2012, *Commission* v *United Kingdom*, C-301/10, EU:C:2012:633, paragraph 71 and the case-law cited).

145 In the present case, it should be noted that the Kingdom of Sweden responded to the Commission's request to provide it with more recent measurement results regarding the reduction of nitrogen in the agglomerations Habo and Töreboda by referring to the SMHI's statement which indicated that that statement was indeed based on more recent measurements of that value, but that those measurements were not available on its website because they were taken from another institution's database.

146 However, it was not until the proceedings before the Court, namely in its defence, that the Kingdom of Sweden informed the Commission that those data were hosted by the SLU and that they were freely available on its website.

147 It should be noted that, in so doing, the Kingdom of Sweden sent the Commission incomplete information during the pre-litigation procedure and impeded the proper functioning of the present proceedings.

148 As the Advocate General noted in point 123 of her Opinion, although the Commission had complained about the lack of specific data, that Member State neither provided such data nor specified the source of the more recent data or its location on the internet. That failure harmed the Commission's preparation of the present action.

149 It follows that the Kingdom of Sweden has failed to fulfil its obligations under Article 4(3) TEU, since it did not, during the pre-litigation procedure, provide the Commission with the information necessary for it to assess whether the waste water treatment plants for the agglomerations Habo and Töreboda satisfy the requirements of Directive 91/271.

150 It follows from all of the foregoing considerations that:

– the Kingdom of Sweden has failed to fulfil its obligations under Article 4 in conjunction with Articles 10 and 15 of Directive 91/271 by not ensuring that, before it is discharged, urban waste water from the agglomerations Lycksele, Malå and Pajala is subject to secondary treatment or an equivalent treatment, and

– the Kingdom of Sweden has failed to fulfil its obligations under Article 4(3) TEU, since it did not, during the pre-litigation procedure, provide the Commission with the information necessary for it to assess whether the waste water treatment plants for the agglomerations Habo and Töreboda satisfy the requirements of Directive 91/271.

Costs

151 In accordance with Article 138(3) of the Rules of Procedure of the Court, the Commission and the Kingdom of Sweden shall each bear their own costs as each party has succeeded on some and failed on other heads.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that the Kingdom of Sweden has failed to fulfil its obligations under Article 4 of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008, in conjunction with Article 10 of Directive 91/271, as amended by Regulation No 1137/2008, by not ensuring that, before it is discharged, urban waste water from the agglomerations Lycksele, Malå and Pajala is subject to secondary treatment or an equivalent treatment, and**

   declares that the Kingdom of Sweden has failed to fulfil its obligations under Article 4(3) TEU, since it did not, during the pre-litigation procedure, provide the European Commission with the information necessary for it to assess whether the waste water treatment plants for the agglomerations Habo and Töreboda satisfy the requirements of Directive 91/271 as amended by Regulation No 1137/2008;

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission and the Kingdom of Sweden to bear their own costs.**

[Signatures]